IN THE SUPREME COURT OF THE UNITED STATES

--------- TERM, 19----

No. 78-553

AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN, A Michigan Not-for-Profit Corporation,

and

RAMSAY COLLISION, INCORPORATED, A Michigan Corporation,
Plaintiffs-Appellants,

-VS-

RICHARD H. AUSTIN, Secretary of State for the State of Michigan,
Defendant-Appellee.

Appeal From the Supreme Court of the State of Michigan

JURISDICTIONAL STATEMENT

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AUTOMOTIVE SERVICE COUNCILS OF MICHIGAN, A Michigan Not-for-Profit Corporation, and RAMSAY COLLISION, INCORPORATED, A Michigan Corporation, *Plaintiffs-Appellants*, -vs- RICHARD H. AUSTIN, Secretary of State for the State of Michigan, *Defendant-Appellee*.	Michigan Supreme Court Docket No. 61405; Michigan Court of Appeals Docket No. 31100; Ingham County Circuit Court Docket No. 76-18583-AZ

JURISDICTIONAL STATEMENT

(a) In the above captioned proceedings:

The denial of application for leave to appeal to the Michigan Supreme Court is to be found at 402 Michigan Reports ..... (1978); ..... Northwestern Reporter, Second Series ..... (1978) (96a). The opinion of the Michigan Court of Appeals is to be found at 82 Mich App 574 (1978) (64a, with the dissenting opinion at 95a). The opinions of the Trial Court are appended at pages 39a and 45a.

(b) (i) This proceeding was originally brought as a Michigan Circuit Court action seeking injunctive relief from enforcement of the Michigan Motor Vehicle Service and Repair Act, 1974 P.A. 300, as amended; MCLA §257.-1301, *et seq.;* effective March 1, 1976 (hereinafter the Act, 1a), and a declaratory judgment that the Act was, at least in part relevant here, violative of procedural due process standards guaranteed under the Federal Constitution, Amendment 14, and the 1963 Michigan Constitution, Article I, Section 17.

(ii) The judgment sought to be reviewed is a denial of application for leave to appeal to and by the Michigan Supreme Court, dated and entered July 5, 1978, from a final judgment of the Michigan Court of Appeals, dated and entered April 17, 1978. Notice of appeal to the United States Supreme Court was filed August 23, 1978 in both the Michigan Supreme Court and the Michigan Court of Appeals (97a).

(iii) This Court is believed to have jurisdiction of the appeal under 28 U.S.C. §1257(2), or, in the alternative, under 28 U.S.C. §1257(3) and 28 U.S.C. §2103.

(iv) Cases which are believed to sustain the jurisdiction of this Court are:

Withrow v. *Larkin,* 421 U.S. 35; 95 S.Ct. 1456 (1975)

Ward v. *Village of Monroeville, Ohio,* 409 U.S. 57; 93 S.Ct. 80 (1972)

United States v. *Robel,* 389 U.S. 258; 88 S.Ct. 419 (1967)

In Re Murchison, 349 U.S. 133; 75 S.Ct. 623 (1955)

Wong Yang Sung v. *McGrath,* 339 U.S. 33; 70 S.Ct. 445 (1950)

Panama Refining Co. v. *Ryan,* 293 U.S. 388; 55 S.Ct. 241 (1935)

A.L.A. Schechter Poultry Corporation v. *United States,* 295 U.S. 495; 55 S.Ct. 837 (1935)

Tumey v. *State of Ohio,* 273 U.S. 510; 47 S.Ct. 437 (1927)

Figueroa Ruiz v. *Delgado,* 359 F.2d 718 (1st Cir. 1966)

United States v. *James,* 440 F.Supp. 1137 (D.Md. 1977)

Haley v. *Troy,* 338 F.Supp. 794 (D.Mass. 1972)

Pale De Mendez v. *Aponte,* 294 F.Supp. 311 (D.P.R. 1969)

(v) The statute, the validity of which is herein involved, is cited as MCLA §257.1301, *et seq.,* and its text is set forth in the attached appendix, (1a-....), along with Part 4 of the General Rules promulgated under the Act and cited as Michigan Administrative Code (MAC) R 257.131-R 257.137 (29a).

(c) The questions presented by the appeal are:

(i) Is the Act violative of procedural due process standards guaranteed by the United States Constitution, Amendment 14, insofar as the Secretary of State is legislatively authorized to make rules defining unfair and deceptive practices, to initiate investigations and investigate regulatees who allegedly violate those rules, to decide to prosecute, to prosecute, to make a quasi-judicial determination that a rule has been violated, to invoke civil sanctions precluding the regulatee from doing business or enforcing his contracts, or to make a quasi-judicial determination that an unfair or deceptive practice has occurred and thus that the regulatee has committed a criminal offense, all without any legislative direction as to what does or should constitute an unfair or deceptive practice?

(ii) Did the Michigan Supreme Court err in refusing to review the Michigan Court of Appeals holding that the

statutory scheme was not violative of due process standards in spite of the extent of the Secretary of State's commingled powers and the absence of delegated standards?

(d) A concise statement of the case is as follows:

On March 1, 1976 the Michigan Motor Vehicle Service and Repair Act became effective in relevant part. On March 5, 1976, plaintiff ASCM filed a complaint in Ingham County Circuit Court alleging, in part, that the Act was violative of Michigan and Federal Constitutional due process standards as set out *supra* herein, see Complaint, ¶¶12 and 13, and requesting injunctive and declaratory relief. Upon defendant's motion for accelerated judgment on the basis that ASCM was not a regulatee, plaintiff ASCM joined Ramsay Collision, Inc., a Michigan garage facility and amended its complaint to reflect that joinder. Plaintiffs' first amended complaint then recited in ¶¶16 and 17 the same federal questions raised in ASCM's original complaint. Plaintiff's motion for preliminary injunction was heard on March 18 and 19, 1976 with testimony and argument given, and a preliminary injunction against enforcement of the statute by defendant was entered on March 29, 1976 (40a).

Defendant thereupon complained for superintending control and/or leave to appeal to the Court of Appeals on March 30, 1976, contending that the trial court had exceeded its authority. Briefs were filed by defendant and plaintiffs, plaintiffs again raising the 14th Amendment due process issues of excessive commingling in the absence of legislatively delegated standards. Appellees' Brief in Support of Answer to Complaint for Superintending Control or in the Alternative in Opposition to Application for Leave to Appeal, pp. 4, 5, 6, 7, 8, 10, 13, 14, 15 (all somewhat obliquely as to whether federal Michigan Constitutional concepts of due process were involved), 16, 17 (where

the 14th Amendment issues are squarely raised) and 18 (same).

In an order entered May 4, 1976, the Court of Appeals dismissed defendant's complaint for superintending control without comment (41a).

On defendant's motion for clarification, and by stipulation of the parties, an order modifying the preliminary injunction was entered on June 7, 1976 (43a).

Defendant moved for summary judgment on May 21, 1976, and filed his brief in support on that date. Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment was filed on July 6, 1976, and argued the federal (as well as the state) constitutional issues raised herein.

On October 13, 1976, the opinion of the trial court issued (45a). Circuit Judge James T. Kallman held that the Act contained no adequate standard to guide the Secretary in defining unfair and deceptive practices, so as to constitute "an unconstitutional delegation of legislative authority to the Secretary," October 13, 1976 Opinion (49a), and "that the combination of functions under the present statutory scheme violates due process of law," *id.*, (53a).

The trial court held, however, that the Act was severable, *id.*, (57a), granted plaintiffs summary judgment as to all sections declared unconstitutional, and granted defendant summary judgment as to all sections declared unconstitutional.

An order of summary judgment issued November 3, 1976 (59a), and was subsequently clarified by an Order entered November 16, 1976 (61a), which permanently enjoined the Secretary from promulgating rules defining unfair and deceptive practices and "from promulgating or enforcing rules pursuant to the Act in investigating, prosecuting or handling adjucatory [sic] hearings concerning alleged vio-

lations of the rules," Summary Judgment of November 3, 1976 (60a).

Defendant filed a claim of appeal to the Michigan Court of Appeals on November 24, 1976. Plaintiffs filed a claim of cross appeal on December 7, 1976. On December 22, 1976, defendant applied for leave to appeal to the Michigan Supreme Court prior to decision by the Court of Appeals, and was joined in that application by plaintiffs on January 7, 1977. Those applications for by-pass appeal were denied by the Michigan Supreme Court by an order entered April 6, 1977 (62a).

Defendant then filed his brief in the Court of Appeals on April 22, 1977. Plaintiffs filed their joint appellees-cross appellants' brief on May 25, 1977, again arguing, as appellees, that the compination of functions in one official, acting without legislative standards for guidance, constituted an absence of procedural due process safeguards. Joint Appellees-Cross Appellants' Brief, p. 6. Again, plaintiffs argued federal, as well as state, constitutional decisional law, *id.*, pp. 12, 13, 24, 25, 26, 27, as to the issues raised herein. As cross-appellants, plaintiffs argued the non-severability of the statute, again arguing federal as well as state law. *Id.*, pp. 28-30.

After oral argument on October 12, 1977, the Michigan Court of Appeals issued its opinion on April 17, 1978 (64a), and held the Act fully constitutional under both federal and state law. Court of Appeals Opinion of April 17, 1978, pp. 2-8.

Plaintiffs thereupon applied for leave to appeal to the Michigan Supreme Court, again arguing federal and state constitutional law in raising the excessive combination of functions in the absence of standards issue. Brief in Support of Application for Leave to Appeal, dated May 8, 1978, pp. 8-12.

Following defendant's filing of his reply brief on May 26, 1978, the Michigan Supreme Court denied plaintiffs' application for leave to appeal, "Because the Court is not persuaded that the questions presented should be reviewed by this Court." Order entered July 5, 1978 (96a).

(e) In the Courts below, the question presented herein was consistently argued in the following way:

1. The delegation to the Secretary of State of authority to make rules defining unfair and deceptive practices without any legislative standards to guide his discretion was clearly violative of the Michigan Constitution, Article IV, Section 22: "All legislation shall be by bill and may originate in either house," as interpreted by Michigan decisional law.

The United States Supreme Court has in the past held such grants of unlimited authority to be unconstitutional delegations of legislative authority in cases such as *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; 55 S.Ct. 241 (1935), and *A.L.A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495; 55 S.Ct. 837 (1935). While the trend in more recent federal cases has been to uphold such delegations, the statutes involved in those cases required the exercise of that power within an "established framework of regularized procedural protection and judicial review," usually with both the statute and the Federal A.P.A. providing that framework. *See*, Davis, Administrative Law Text, Chapter 2 (Third Edition, 1972). Cited part at p. 34.

2. The legislative scheme granting the Michigan Secretary of State such extraordinarily extensive and commingled powers is probably violative of the due process standards required by the Michigan Constitution, Article I, Section 17, as implied by Michigan decisional law, par-

ticularly *Crampton* v. *Dep't of State*, 395 Mich 347, 235 NW2d 352 (1975).

It is probably also violative of the due process standards required by the United States Constitution, Amendment 14, as interpreted in cases such as *In Re Murchison*, 349 U.S. 133; 75 S.Ct. 623 (1955); *Withrow* v. *Larkin*, 421 U.S. 35; 95 S.Ct. 1456 (1975); *Tumey* v. *State of Ohio*, 273 U.S. 510; 47 S.Ct. 437 (1927); *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57; 93 S.Ct. 80 (1972); *Figueroa Ruiz* v. *Delgado*, 359 F.2d 718 (1st Cir. 1966); *Pale De Mendez* v. *Aponte*, 294 F.Supp. 311 (D.P.R. 1969); *Haley* v. *Troy*, 338 F.Supp. 794 (D.Mass. 1972); and *United States* v. *James*, 440 F. Supp. 1137 (D.Md. 1977).

Wong Yang Sung v. *McGrath*, 339 U.S. 33; 70 S.Ct. 445 (1950), of course, went off on the question of applicability of the Federal A.P.A. to deportation proceedings, but again, the elementary principles of inconsistent functions are laid out there. With *Murchison* and *Withrow* we have come a step further and now must ask: Which of "the various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable," *Withrow*, *supra*, at 47, even in the presence of a state administrative procedures act which may or may not cure the effects of that probability of bias.

Plaintiffs contended in the courts below, and continue to contend here, that the *very extent* of the powers granted the Secretary, *by itself*, guarantees a probability of actual bias which is too high to be constitutionally tolerable.

3. It is when problems (1) and (2) are combined, as they were by plaintiffs in the courts below, that the gravity and substantiality of the federal question can be seen. The Secretary may not only make the painting of an automobile red an unfair and deceptive practice under the Act, he may put garagemen doing it out of business and do

everything else necessary through and to finding him criminally liable.

In this regard, the Court's attention is directed to the Unfair and Deceptive Practices Rules which actually have been promulgated, See Appendix at 29a. A grocery-list of rules such as this clearly gives the Secretary totally unfettered discretion to bring about any business practice into the ambit of the statute. As soon as the Secretary decides that he disapproves of a particular practice, he may easily find a rule in that list which makes the practice unfair and deceptive. Section 7 of the Act prohibits engaging or attempting to engage in a method, act or practice which is unfair or deceptive. Thus, violation of the unfair and deceptive practices rules constitutes violation of the Act and subjects the garageman to criminal sanctions under Section 38, as well as to the myriad of civil sanctions contained in the Act.

Although plaintiffs know of no cases to sustain the jurisdiction of this Court on the *combination* of inconsistent functions and delegation without meaningful standards, *U.S.* v. *Robel*, 389 U.S. 258; 88 S.Ct. 419 (1967) is supportive of that jurisdiction in the concurring opinion of Mr. Justice Brennan insofar as he characterized the problem of the constitutionality of §5(a)(1)(D) of the Subversive Activities Control Act of 1950 not as one of overbreadth but as one of a delegation absent meaningful standards in combination with an effect on liberty and the exercise of fundamental freedoms. In both that case and this liberty is at stake. In that case the fundamental freedom was the 1st Amendment freedom of association; in this the right to procedural due process, fair and unbiased, the right to employment, and the right to contract.

As Justice Brennan carefully pointed out, Congress ordinarily may delegate power under broad standards which establish general policy and set a context which limits the power conferred. "Given such a situation, it is possible for

affected persons, within the *procedural structure usually established for the purpose*, to be heard by the implemented agency and to secure meaningful review of its actions in the courts. . . ." *United States* v. *Robel, supra,* at 274-75 [emphasis added]. This expression of constitutional limitations on Congress's power to delegate authority to complementing federal agencies is presumably no less applicable to state legislative branches exercising comparable functions; indeed the standard suggested *may* be too loose for state legislative delegations in the absence of procedural structures clearly comparable to those established in federal law. As a matter of federal law, broad delegation standards, seen as both necessary and desirable in the complex and ever changing fields subject to federal regulation, are consistent with due process demands *as long as* those standards identify a context of congressional policy and regulatory intent within which the agency's actions are subject to effective scrutiny and review. Practical necessities of a complex society aside, the legislative branch can only delegate — it cannot abdicate. Any other conclusion would force both an obvious breach of the doctrine of separation of powers, which is basic to the structure of state and federal government alike, and establish an untenable probability of denials of due process in the administrative exercise of power.

However easily stated the principles may be, the instant case reveals the application of these principles to be less than simple. The state regulatory scheme in question is undoubtedly extensive in its reach — it affects the primary mode of transportation for virtually the entire population of the State of Michigan and it directly restricts the traditional basic business practices of the entire service industry related to that mode of transportation. Fundamental rights of contract and the ability to maintain gainful employment are the direct objects of regulation. Under the

statute and Rules, the regulatory agency establishes the form of all business transactions in the industry; the same agency investigates for compliance, adjudicates internal and external allegations of noncompliance, enforces administrative civil sanctions and initiates criminal sanctions. The central question presented is whether delegation of this broad spectrum of power over the industry is constitutionally impermissible where the legislative enactment (1) authorizes agency definition of "unfair and deceptive practices: without any standards and (2) commingles all functions of review within that same agency. The agency may outlaw a business practice [utilization of particular estimate forms, for example] by labelling it an "unfair and deceptive" practice and leave the affected regulatee no practical option except to either comply or raise the propriety of the ban in either a criminal defense posture or by means of affirmative judicial challenge to the Rule definition.

An opportunity for effective agency review is impractical for the reason that there are no express statutory constraints or guidelines on the exercise of rule making power and the rule maker is in addition the investigator, adjudicator and enforcer of its rules. This combination of authority almost per force suggests a high probability of institutionalized bias appearing in any internal review of agency rule making power or the application of such rules.

If the judicial challenge option is chosen, the regulatee faces a situation where there is *no* legislative indication of the scope of "unfair and deceptive practices" unless some broad indication is inferred from the context of the various sections of the Act or the pages of a dictionary. Faced with such uncertainty the regulatee must either automatically comply or put at risk both his liberty and his livelihood.

Perhaps the federal question presented here is simply stated, if not answered: How much raw, unfettered, totally

discretionary power over individual liberty, property and freedom may a State confer on its bureaucracy with any particular statutory scheme?

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